Supreme Court, U. S.
FILED
APR 27 1977
MICHAEL

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

---

No. 76-1250

---

VELSICOL CHEMICAL CORPORATION,
*Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF FOR RESPONDENT ENVIRONMENTAL DEFENSE FUND, INC. IN OPPOSITION

---

JACQUELINE M. WARREN
ENVIRONMENTAL DEFENSE FUND
1525 18th Street, N.W.
Washington, D. C. 20036
(202) 833-1484

*Attorney for Respondent*
*Environmental Defense Fund*

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

# INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statutory Provisions Involved | 2 |
| Statement | 2 |
| Argument | 6 |
| I. The Decision of the Court of Appeals on the Burden of Proof Issue Was Consistent With Prior Interpretations of FIFRA and with the Legislative Intent | 7 |
| II. The Court's Interpretation of § 7(c) of the APA is Consistent with the Legislative History of the Provision and with Relevant Decisions Construing It | 11 |
| Conclusion | 14 |

## TABLE OF AUTHORITIES


Cases: Page

*Continental Chemiste Corp.* v. *Ruckelshaus*, 461 F.2d 331 (7th Cir. 1972) ..... 7
*Dow Chemical Co.* v. *Ruckelshaus*, 477 F.2d 1317 (8th Cir. 1973) ..... 7
*Environmental Defense Fund* v. *Environmental Protection Agency*, 510 F.2d 1292 (D.C. Cir. 1975) ..... 7, 9
*Environmental Defense Fund* v. *Environmental Protection Agency*, 465 F.2d 528 (D.C. Cir. 1972) ..... 7
*Environmental Defense Fund* v. *Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) ..... 7
*N.L.R.B.* v. *Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974) ..... 10
*N.L.R.B.* v. *Atlanta Coca-Cola Bottling Company*, 293 F.2d 300, (5th Cir.), *rehearing denied*, 296 F.2d 896 (1961) ..... 12
*Kerner* v. *Flemming*, 283 F.2d 916 (2d Cir. 1960) ..... 12
*Kirby* v. *Shaw*, 358 F.2d 446 (9th Cir. 1966) ..... 12
*Old Ben Coal Corp.* v. *Interior Board of Mine Operations Appeals*, 523 F.2d 25 (7th Cir. 1975) ..... 13
*Southern National Manufacturing Co.* v. *Environmental Protection Agency*, 470 F.2d 194 (8th Cir. 1972) ..... 7
*Stearns Electric Paste Co.* v. *Environmental Protection Agency*, 461 F.2d 293 (7th Cir. 1972) ..... 7, 8
*United States* v. *Springer*, 491 F.2d 239 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974) ..... 12

Statutes:

7 U.S.C. § 136a(a) ..... 2
7 U.S.C. § 136a(c)(5)(C) ..... 2
7 U.S.C. § 136d(a)(2) ..... 3
7 U.S.C. § 136d(b) ..... 3
7 U.S.C. § 136d(c)(1) ..... 2, 3




## TABLE OF AUTHORITIES—Continued


Page

7 U.S.C. § 136d(c)(2) ..... 3
7 U.S.C. § 136d(c)(3) ..... 3
7 U.S.C. § 136d(c)(4) ..... 5
5 U.S.C. § 556(d) ..... 5, 6, 7

Reports:

S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972) ..... 9, 10
H.R. Rep. No. 92-511, 92d Cong., 1st Sess. (1971) ..... 9, 10
H.R. Rep. No. 1125, 88th Cong., 1st Sess. (1964) ..... 8
H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), *reprinted* in S. Doc. 248, 79th Cong., 2d Sess. (1946) ..... 11
S. Rep. No. 752, 79th Cong., 1st Sess. (1945), *reprinted* in S. Doc. 248, 79th Cong., 2d Sess. (1946) ..... 11

Miscellaneous:

41 Fed. Reg. 7555 (February 19, 1976) ..... 1
41 Fed. Reg. 7572 (February 19, 1976) ..... 1
39 Fed. Reg. 37246, 37265, 37267, n. 27 (October 18, 1974) ..... 10
40 C.F.R. § 164.80(a) ..... 4
40 C.F.R. § 164.80(b) ..... 4
40 C.F.R. § 164.121(g) ..... 4
McCormick, *Law of Evidence* (2d ed. 1972) ..... 13
*Attorney General's Manual on the Administrative Procedure Act* ..... 12

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

---

No. 76-1250

---

VELSICOL CHEMICAL CORPORATION,
*Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF FOR RESPONDENT ENVIRONMENTAL DEFENSE FUND, INC. IN OPPOSITION

---

### OPINIONS BELOW

The principal and supplemental opinions of the Court of Appeals (App. 1-39)[1] are reported at 548 F.2d 998 (D.C. Cir. 1977). The decision of the Administrator of the Environmental Protection Agency (App. 136-208) is reported at 41 Fed. Reg. 7572. The recommended decision of the Administrative Law Judge ("ALJ") (App. 42-135) is reported at 41 Fed. Reg. 7555.

---

[1] "App." refers to the Appendix, and "Pet." to the Petition.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

Whether the registrant of a pesticide bears the burden of persuasion in suspension proceedings under the Federal Insecticide, Fungicide and Rodenticide Act.

## STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions involved are set forth at App. 209-224.

## STATEMENT

Petitioners seek review of a judgment of the Court of Appeals for the District of Columbia Circuit affirming an order by the Administrator of the Environmental Protection Agency ("EPA") which suspended the registrations of the pesticides heptachlor and chlordane for certain uses pursuant to § 6(c)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136d (c)(1) ("FIFRA"). The Administrator's action was based upon his conclusion that the continued use of the two pesticides presented an imminent hazard of cancer to humans.

Section 3 of FIFRA provides that no pesticide may be distributed, sold or otherwise placed in commerce unless it has been registered with the Administrator of EPA. 7 U.S.C. § 136a(a). A pesticide is eligible for registration only if the Administrator determines *inter alia* that "it will perform its intended function without unreasonable adverse effects on the environment." 7 U.S.C. § 136a (c)(5)(C). Registration remains in effect for five years, during which period the registrant has a continuing re-



sponsibility to submit to the Administrator any "additional factual information regarding unreasonable adverse effects on the environment." 7 U.S.C. § 136d(a)(2).

At any time prior to the 5-year automatic cancellation (at which time the pesticide may be re-registered), the Administrator may initiate proceedings to cancel the registration if he finds that the pesticide "generally causes unreasonable adverse effects on the environment." 7 U.S.C. § 136d(b). In such a case, a person adversely affected by the notice of intent to cancel may request a public hearing. 7 U.S.C. § 136d(b). FIFRA also provides that "[i]f the Administrator determines that action is necessary to prevent an imminent hazard during the time required for cancellation . . . proceedings," he may issue a notice of intent to suspend the registration pending completion of the cancellation proceedings. 7 U.S.C. § 136d(c)(1). Unless the Administrator has already done so, a notice of intent to cancel must be issued at the same time. 7 U.S.C. § 136d(c)(1). The registrant may then request an expedited hearing on the issue of suspension pursuant to § 6(c)(2) of FIFRA, 7 U.S.C. § 136d(c)(2). In cases of extreme emergency, the Administrator may issue a suspension order which takes effect immediately, prior to a hearing. 7 U.S.C. § 136d (c)(3).

On November 18, 1974, citing evidence of carcinogenicity and pervasive residues of chlordane and heptachlor in the food supply and in human tissues, the Administrator issued a notice of intent to cancel the registrations of the two pesticides, which are produced by Petitioner Velsicol Chemical Corporation. For the next eight months, Petitioner and other parties engaged in prehearing conferences, informal discovery, exchanges of documents and other preparation for the commencement of cancellation hearings. On July 29, 1975, the Administrator issued a notice of intent to suspend the registra-

tions of the two pesticides pending completion of the cancellation proceeding. Pursuant to § 6(c)(1), Velsicol requested and was granted an expedited hearing which commenced on August 12, 1975 and continued for 43 non-consecutive hearing days covering a four-month period. The record was closed on December 4, 1975.

The allocation of the burden of proof at suspension hearings is governed by an EPA regulation which provides that:

> At the hearing, the proponent of suspension shall have the burden of going forward to present an affirmative case for suspension. However, the ultimate burden of persuasion shall rest with the proponent of the registration. 40 C.F.R. § 164.121(g).

The same allocation is made in hearings involving cancellation, change in classification and denial of registration. 40 C.F.R. § 164.80(a), (b).

The ALJ issued a decision on December 12, 1975, which recommended dismissal of the notice of intent to suspend. He specifically disagreed with Velsicol on the burden of proof issue, however, noting that prior agency and judicial interpretations of FIFRA had placed the burden of proof of safety upon the registrant at all times, including in suspension proceedings (App. 96). The ALJ further observed that "[it] would be strange, indeed, that the 1972 amendment to the act [which established the suspension hearing procedure] would change the cornerstone of the statute without mention." (App. 97).

On December 24, 1975, the Administrator issued an order suspending most registrations of chlordane and heptachlor. The order accepted the ALJ's findings of fact but held that his ultimate conclusion on imminent hazard was "deficient as a matter of law" because it "failed to weigh adequately the risks in relation to the benefits as required by the statute and by Agency policy." (App.



141-145). The Administrator concurred, however, with the ALJ's construction of agency and judicial precedents regarding placement of the burden of proof, emphasizing that "it is not the Agency's burden to establish the risk of harm, but rather the registrant's burden to disprove it once its safety has been called into question by a sufficient showing of probable risk." (App. 146).

Velsicol, the Environmental Defense Fund, the U.S. Department of Agriculture and several other parties to the administrative proceeding petitioned for review of the administrator's order pursuant to 7 U.S.C. § 136d(c)(4). On November 10, 1976, the Court of Appeals held that the Administrator's suspension order was supported by substantial evidence that chlordane and heptachlor were animal carcinogens and posed a cancer hazard for humans. (App. 10-16). The court also affirmed the validity of EPA's allocation of the burden of proof. In so doing, it cited prior decisions holding that FIFRA does not require the Administrator to find that a product is unsafe in order to suspend a registration since the statute places "the burden of establishing the safety of a product requisite for compliance with the labeling requirements . . . at all times on the applicant and registrant." (App. 8). The court concluded, moreover, that EPA's allocation of the burdens of proceeding and of persuasion was also consistent with the Administrative Procedure Act, 5 U.S.C. § 556(d) ("APA"). (App. 8-9). Finally, the court pointed out that acceptance of Velsicol's arguments that the Administrator must prove imminent hazard beyond a showing of substantial likelihood of harm would "effectively foreclose" interim action to protect public health or the environment while a fuller factual record is being developed in the cancellation proceeding. (App. 10).

In denying Velsicol's petition for rehearing *en banc*, the Court of Appeals on January 6, 1977 issued a Supplemental Opinion reaffirming its original view that EPA's

allocation of the burden of proof is consistent with the APA. The court held, however, that the legislative history and numerous cases construing the controlling statute, FIFRA, indicate that "this case is one where the location of the burden of proof is, in the language of the APA, 'otherwise provided by statute.'" (App. 27). It therefore reiterated that in a suspension hearing, "the burden of persuasion rests ultimately on the registrant." (App. 38).

## ARGUMENT

The Court of Appeals was correct in holding that the allocation of the ultimate burden of proof in pesticide suspension cases is controlled by FIFRA, which places that burden on the registrant. (App. 27). Petitioner's characterization of this holding as an "alternate ground" (Pet. 6) misreads the Supplemental Opinion. Although the court reaffirmed its view, stated as *dicta* in both opinions, that the APA "does not preclude assignment of the burden of persuasion to the opponent of an order" (App. 27), the holding of the Supplemental Opinion is that in FIFRA suspension hearings, "the location of the burden of proof is, in the language of the APA, 'otherwise provided by statute,' 5 U.S.C. § 556(d)." (App. 27). This holding does not raise a question of federal law of sufficient magnitude to warrant consideration by this Court nor is there any conflict among the Circuits on the issue.[2]

The court's supplemental ruling on the burden of proof is entirely consistent with its initial opinion that under the statutory scheme created by FIFRA, the burden of

[2] In fact, allocation of the burden of proof was a secondary issue in the Court of Appeals and was not dispositive of the outcome of the case. The court ruled that the Administrator's finding that chlordane and heptachlor posed an imminent hazard to human health was supported by substantial evidence. Petitioner did not contest that ruling either in its petition for rehearing *en banc* or in the petition for *certiorari*.



establishing the safety of a pesticide remains at all times on the registrant. (App. 8). The *arguendo* discussion of Velsicol's APA argument, ("Assuming that the Administrator is the 'proponent' of a suspension order and is governed by § 556(d). . .") (App. 8), was not crucial to the court's conclusion that FIFRA governs the placement of the burden of proof in pesticide suspension hearings. It merely indicated the panel's view that even if § 556(d) were applicable, (the clear implication being that it is not) "EPA's allocation of burden of proof is consistent with the requirements of [that section. . . ]." (App. 9). Both the legislative history and the relevant cases confirm that the court's reading of FIFRA and of the APA were correct.

### I. The Decision of the Court of Appeals on the Burden of Proof Issue Was Consistent With Prior Interpretations of FIFRA and with the Legislative Intent

There is no conflict between the decision of the Court of Appeals here and its prior decisions or those of other courts of appeals on the issue of the burden of proof under FIFRA. All of the courts considering the issue have agreed that FIFRA places upon the pesticide manufacturer a continuing burden of proving that a product is safe and therefore entitled to registration. *See Environmental Defense Fund* v. *Environmental Protection Agency*, 510 F.2d 1292 (D.C. Cir. 1975); *Environmental Defense Fund* v. *Environmental Protection Agency*, 465 F.2d 528 (D.C. Cir. 1972); *Environmental Defense Fund* v. *Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *Dow Chemical Co.* v. *Ruckelshaus*, 477 F.2d 1317 (8th Cir. 1973); *Southern National Manufacturing Company* v. *Environmental Protection Agency*, 470 F.2d 194 (8th Cir. 1972); *Stearns Electric Paste Co.* v. *Environmental Protection Agency*, 461 F.2d 293 (7th Cir. 1972); *Continental Chemiste Corp.* v. *Ruckelshaus*, 461 F.2d 331

(7th Cir. 1972). That burden was specifically shifted from the Secretary of Agriculture to the registrant in the 1964 amendments to FIFRA.[3]

The foregoing precedents and the absence from the legislative history of FIFRA of any contrary suggestion persuaded the court that the general incorporation in the 1972 amendments to FIFRA of APA adjudicatory hearing standards for suspension proceedings was not intended to alter radically the statutory scheme of FIFRA by shifting the ultimate burden of proof to the Administrator "*sub silentio*." The court therefore correctly concluded that FIFRA does not allocate "a burden of proof that is different for suspension hearings than for registration or cancellation proceedings." (App. 37).

Congress' intention in providing for separate suspension proceedings in 1972 is apparent from the legislative history. Prior to 1972, FIFRA provided for immediately effective suspension orders, giving the registrant only an opportunity for submission of the matter to an advisory committee and, thereafter, for an expedited cancellation hearing.[4] The 1972 provision for expedited suspension hearings, which originated in the Senate, was designed to ensure that upon issuance of a suspension notice, the registrant would have an opportunity for an adjudica-

[3] H.R. Rep. No. 1125, 88th Cong., 1st Sess. 2 (1964).

[4] In a strained effort to distinguish between suspension and other regulatory proceedings under FIFRA, Petitioner makes much of the fact that in *Stearns Electric Paste Co.* v. *Environmental Protection Agency*, 461 F.2d 293 (7th Cir. 1972), the court "conspicuously" did not place the burden of proof on the registrant in suspension proceedings. (Pet. 11). The simple reason for this omission is that before 1972, FIFRA made no provision for separate suspension hearings. The reasoning of the *Stearns* court strongly suggests, moreover, that the burden would remain on registrants even in suspension proceedings. 461 F.2d at 304-5.



tory hearing on the question of suspension, and for review of the suspension decision in the Court of Appeals.[5]

In explanation of the inclusion of a provision for expedited suspension hearings the Senate Report stated that "[t]he Committee has also provided for expedited hearings on questions of suspension so that the procedure will be analogous to cancellation."[6] No mention was made here or elsewhere in the reports or debates of any intention to shift the ultimate burden of proof to the Administrator in suspension hearings.[7]

Congress substantially amended FIFRA again in November, 1975. The previous April, the Administrator's October, 1974 decision suspending similar pesticides, aldrin and dieldrin, on the ground of carcinogenic risk to humans, had been upheld by the Court of Appeals. *See Environmental Defense Fund* v. *Environmental Protection Agency*, 510 F.2d 1292 (D.C. Cir. 1975). Consistent with prior agency precedent and the EPA rules of practice, the burden of proof in the aldrin/dieldrin suspension hearings had been allocated to the registrant, who unsuc-

[5] The earlier House version of the bill contained no separate provision for suspension hearings and provided only for limited district court review of suspension orders. H.R. Rep. No. 92-511, 92d Cong., 1st Sess. 22 (1971).

[6] S. Rep. No. 92-838, 92d Cong., 2d Sess. 13 (1972). Cancellation proceedings were adjudicatory and conducted pursuant to APA standards although the burden of persuasion was allocated to the registrant. At the time of the 1972 amendments, the validity of this allocation of burden had been upheld by several courts of appeals. *See*, pre-1973 cases cited in text at p. 7 *supra*.

[7] That both Houses were keenly aware of the placement of the burden of proving safety upon the registrant is clear from the Senate and House Reports, which reiterate that "[t]he burden of proof remains with the applicant (as in [pre-1972] FIFRA) to substantiate the claims for the pesticide by test data and otherwise to support the registration of a pesticide." S. Rep. No. 92-838, 92d Cong., 2d Sess. 20 (1972); H.R. Rep. No. 92-511, 92d Cong., 1st Sess. 20 (1971).

cessfully raised before both the ALJ and the Administrator the same arguments as Petitioner makes here.[8] The suspension decision was widely publicized, but Congress made no effort to alter EPA's allocation of the burden of persuasion, even though substantive changes were made to other provisions of § 6 of FIFRA. As this Court has stated, according to established principles of statutory construction,[9]

> A court may accord great weight to the long-standing interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress. (footnotes omitted)

The overriding purpose of the 1972 amendments to FIFRA (which established the suspension hearing procedure) was to "regulate the use of pesticides to protect man and his environment." [10] To achieve this purpose, Congress reaffirmed its 1964 placement of a continuing burden upon pesticide registrants to establish the safety of their products. As pointed out above, the allocation of the burden of proof in suspension hearings advanced by Velsicol would completely disrupt this statutory scheme. The Court of Appeals correctly rejected such a construction because it would force the public to "bear the risk of uncertainty concerning the safety of a covered poison" (App. 38-39) contrary to the specific intent of Congress in placing that burden upon the registrant.

---

[8] *In re* Shell Chemical Co., FIFRA Docket Nos. 145 *et al.*, 39 Fed. Reg. 37246, 37265, 37267, n. 27 (October 18, 1974).

[9] *National Labor Relations Board* v. *Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274-5 (1974).

[10] S. Rep. No. 92-838, 92d Cong., 2d Sess. 1 (1972); *See also* H.R. Rep. No. 92-511, 92d Cong., 1st Sess. 14 (1971).



## II. The Court's Interpretation of § 7(c) of the APA is Consistent with the Legislative History of the Provision and with Relevant Decisions Construing It

Even though this case is controlled by FIFRA and therefore falls within the exception to § 7(c) of the APA, the Court of Appeals correctly concluded that "the APA does not preclude the assignment of the burden of persuasion to the opponent of an order." (App. 27). As both of the court's opinions clearly demonstrate, the legislative history of the APA indicates beyond question that Congress in enacting § 7(c) was concerned with the burden of coming forward with the evidence rather than with the ultimate burden of persuasion (App. 8-9, 31-33). In explanation of § 7(c), the Senate Report states:

> That the proponent of a rule or order has the burden of proof means not only that *the party initiating the proceeding has the general burden of coming forward with a prima facie case* but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945), *reprinted* in S. Doc. 248 at 208 (1946). (emphasis added)

The House Report repeats this explanation in identical language, and further states that "[t]he first and second sentences of the section [App. 209] therefore mean that, where a party having the burden of proceeding has come forward with a *prima facie* and substantial case, he will prevail unless his evidence is discredited or rebutted." [11]

The court concluded that if the change in the language of an early version of § 7(c) from "burden of proceeding" to "burden of proof," upon which Petitioner places so much weight (Pet. 9-10), had been deliberately in-

---

[11] H.R. Rep. No. 1980, 79th Cong., 2d Sess. 34 (1946), *reprinted* in S. Doc. 248 at 270, 271.

tended to govern placement of the burden of persuasion, the Committee reports would have so indicated. (App. 33). The Committee Reports not only fail so to indicate, but they also repeatedly discuss the meaning of "burden of proof" in terms of the "burden of proceeding." In addition to the Committee reports, the court was also persuaded of the correctness of its interpretation by the 1947 *Attorney General's Manual on the Administrative Procedure Act*, which states that "[t]here is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward.'" (App. 33).

Petitioners concede that there is no conflict among the Circuits on this issue (Pet. 6). They assert, however, that "analytical inconsistency" with prior decisions of other Circuits warrants plenary consideration by this Court. The Court of Appeals examined the cases upon which this claim was based and found not a single precedent holding that the proponent of an order *ipso facto* bears the burden of persuasion under the APA. As the court correctly observed, "most of the cases . . . appear to think of 'burden of proof' as the burden of producing evidence." (App. 29). *See N.L.R.B.* v. *Atlanta Coca-Cola Bottling Company*, 293 F.2d 300 (5th Cir.), *rehearing denied*, 296 F.2d 896 (1961); *United States* v. *Springer*, 491 F.2d 239 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974); *Kirby* v. *Shaw*, 358 F.2d 446 (9th Cir. 1966).

Petitioners cite only two cases which deal at all with the burden of persuasion. The first, *Kerner* v. *Flemming*, 283 F.2d 916 (2d Cir. 1960), obliquely addresses the issue in *dicta*. The Court of Appeals properly declined to accept as precedent the Second Circuit panel's *arguendo* assumption that "an applicant [*i.e.*, proponent] for a disability pension has the ultimate burden of per-



suasion" (App. 30) because it did not govern the outcome of the case.[12]

The second case, *Old Ben Coal Corporation* v. *Interior Board of Mine Operations Appeals*, 523 F.2d 25 (7th Cir. 1975), is discussed in the Supplemental Opinion (App. 30) and directly supports the Court of Appeals' interpretation of § 7(c) of the APA. Contrary to Petitioner's assertion that *Old Ben* underscores the "continuing uncertainty" about the meaning of the burden of proof requirement of § 7(c) (Pet. 7), the case clearly demonstrates the Seventh Circuit's *en banc* conclusion that the section allocates the burden of going forward rather than the burden of persuasion in administrative proceedings. In *Old Ben*, the Seventh Circuit held that where Congress placed the primary responsibility for mine safety upon the mine operators, in a hearing contesting an imminent danger order,

> [t]he burden of proof is split, with the Government bearing the burden of going forward, and the mine operator bearing the ultimate burden of persuasion. 523 F.2d at 39.

---

[12] McCormick has also pointed out that the *Kerner* case is representative of a trend confined largely to disability cases whereby the courts are employing the substantial evidence standard to impose a special burden of proof on administrative agencies distributing compensation benefits. In such cases, "reviewing courts are more concerned with the remedial, risk-spreading purposes of the statutes and the comparative inability of the claimant to present additional proof." McCormick, *Law of Evidence* 854 (2d ed. 1972). In contrast, McCormick notes that precisely the opposite trend is apparent in administrative adjudications where the activities of business respondents are tested, since manufacturers are presumed to have access to full knowledge about their products:

> As increasing weight is given to the public interest in fair dealing and in a healthier environment, we can expect further developments either imposing strict liability on certain business activities (footnote omitted) or requiring that the business establish by substantial evidence that its practices should not be prohibited. *Id.*

Thus, the case law as well as the legislative history demonstrate that the Court of Appeals correctly interpreted § 7(c) of the APA.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACQUELINE M. WARREN
ENVIRONMENTAL DEFENSE FUND
1525 18th Street, N.W.
Washington, D. C. 20036
(202) 833-1484

*Attorney for Respondent*
*Environmental Defense Fund*